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STATE CAPITOL  
PHOENIX, ARIZONA

April 11,

DEPARTMENT OF LAW LETTER OPINION NO. 74-101-2

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ARIZONA ATTORNEY GENERAL

REQUESTED BY: THE HONORABLE JAMES F. McNULTY, JR.  
Arizona State Senator

QUESTION: Is every member of the Legislature entitled to subsistence as provided in A.R.S. § 41-1104 during a special session, including days in which the Legislature stands at recess?

ANSWER: See body of opinion.

Although the question refers to A.R.S. § 41-1104, in fact two sections of Arizona Revised Statutes (A.R.S. §§ 41-1103 and 41-1104) cover the payment of subsistence to legislators. We therefore have quoted them in their entirety. A.R.S. § 41-1103 provides as follows:

A. Commencing with the first regular session of the twenty-ninth legislature, members of the legislature shall each receive an annual salary of six thousand dollars.

B. In addition to the salary provided in subsection A, each member of the legislature shall also be reimbursed for travel and subsistence expenses incurred in attendance upon regular sessions or special sessions and for acting in a legislative matter, other than in a regular or special session, upon prior approval of the presiding officer of either house of the legislature at such rate and in such manner as may be prescribed by law.

A.R.S. § 41-1104 states:

A. Each member of the legislature shall be reimbursed for travel as prescribed by law and such reimbursement shall include travel from the temporary or permanent residence of the member to the state capitol.

B. Each member of the legislature shall be paid the sum of ten dollars each day for subsistence during a regular or special session

and the sum of ten dollars each day for subsistence when a member acts on a legislative matter, other than in a regular or special session, upon the prior approval of the presiding officer of the house of which he is a member. Each member who was elected from a district outside of Maricopa county shall receive an additional ten dollars for each day as subsistence in a regular or special session. Each member who acts on a legislative matter, within this state in a county other than his residence, with the prior approval of the presiding officer of the house of which he is a member, shall be paid an additional ten dollars for each day as subsistence.

C. Each member of the legislature, for authorized travel out of state, shall receive travel and subsistence expenses as prescribed by law for state officers.

D. For payment of travel expenses and subsistence, as prescribed by the terms of this section, each member of the legislature shall submit a claim therefor countersigned by the presiding officer of the respective body.

Because A.R.S. §§ 41-1103.B and 41-1104.B deal with the same subject matter, they are in pari materia, and must be read together with meaning given to each. See Campbell v. Superior Court, 18 Ariz.App. 287, 501 P.2d 463 (1972). When those sections are read together, as they apply to the issue herein, they provide that a legislator elected from a district in Maricopa County shall be paid \$10.00 each day, and a legislator from a district outside of Maricopa County shall be paid \$20.00 each day, during a regular or special session for subsistence expenses while in attendance upon such regular or special session.

We understand that the question has arisen as a result of the recess from December 21, 1973, to January 6, 1974, during the First Special Session of the 31st Legislature. Therefore, to answer your question we must determine whether

the Legislature was in session during the recess and whether legislators were in attendance upon the special session when the Legislature stood at recess.

The definition of "session" is discussed in 79 C.J.S., Session or Sessions, § 146 (1952), as follows:

"Session" is frequently employed with respect to courts, legislative bodies, or other assemblies to express the time concept, and when the word is used for this purpose it has several significations, and it sometimes is employed to indicate an actual sitting of such a body, not interrupted by adjournment. In this sense it denotes the time during which the body or tribunal is convened and actually engaged in business; the period of time within one day during which such a body or tribunal is assembled in form and engaged in the transaction of business. At other times the word "session" is employed to indicate an actual sitting continued by adjournments in ordinary course from day to day, or over Sundays and holidays, but not interrupted by adjournment to a distant day.

At still other times the word "session" is employed as the equivalent of "term" to indicate the entire period intervening between the convening of a tribunal or assembly and its final adjournment and in this, a more extended, sense, it denotes the space of time between the first meeting and the prorogation or final adjournment; the time, period, space, or term during which a court, council, legislature, or the like, meets daily or regularly for business, or transacts business regularly, without breaking up; the time during which any body of persons or tribunal is organized, competent for transaction of its business. With respect to the use of the term in this latter sense it has been said that a session is a meeting which, although it may last for days, is virtually one meeting, and continues, notwithstanding repeated recesses or adjournments, until the final close or end

in some way provided by law. The intermediate adjournments from day to day do not destroy the continuity of the meeting; the several sittings which are the result of the intermediate adjournments in reality constitute one session. An adjournment to meet again at some other time terminates the meeting, but not the session, and the next meeting in such a case would be an adjourned meeting of the same session.

The Supreme Court of the Territory of Arizona twice considered the meaning of Section 1852 of the Revised Statutes of the United States, as amended December 23, 1880, which provided: "The sessions of the legislative assemblies of the several territories of the United States shall be limited to sixty days' duration." In Cheyney v. Smith, 3 Ariz. 143, 23 P. 680 (1890), the court said:

It therefore remains for us to determine which of the two views as to the proper construction to be placed upon said section contended for at the hearing of the case we should adopt, viz., upon the one hand that the session of the legislative assembly is limited therein to sixty consecutive days from the day upon which the assembly convenes; or, upon the other hand, that the session is limited to sixty legislative or working days, exclusive of Sundays, public holidays, and days of intermediate adjournment. After the careful consideration the great public interests involved in this controversy demand, we have arrived at the conclusion that the latter view must prevail. 3 Ariz. at 144.

However, in 1895, the Supreme Court of the Territory of Arizona expressly overruled Cheyney v. Smith, *supra*, and adopted the view that a legislative session is the entire time period intervening between the convening of the Legislature and its final adjournment. County of Maricopa v. Osborn, 4 Ariz. 331, 40 P. 313 (1895). It is our opinion that the meaning of "session" in the Constitution and statutes of Arizona follows the decision in County of Maricopa v. Osborn, *supra*. Therefore, the Legislature is in session

during a recess intervening the date of convening and the date of adjournment sine die.

It follows that a legislator would be entitled to payment for subsistence, as provided in A.R.S. § 41-1104, in which he was in attendance upon the special session.

The question of when a person is in attendance upon a session has been considered infrequently and then only as it relates to compensation. We think, however, that the compensation cases are analogous to the subsistence question.

The Supreme Court of Alabama has expressed its opinion on the law in Ex parte Pickett, 24 Ala. 91 (1854). The court said at 94-96:

So far as the right to per diem compensation is involved, it must turn on the meaning of the words "each day's attendance," as used in the 43d section. It could never have been intended that the members of the legislature should receive pay for those days only on which they were actually engaged in the business of legislation; and neither the language employed, nor the purposes of the statute, would force such a construction upon us.

A member may be engaged in attendance on the General Assembly, during periods of temporary cessations of legislative functions by the respective bodies; and the per diem compensation was intended as a remuneration for the services of the members, as well as to provide for their expenses during the period they were required to be absent from their homes in attending to the duties of legislation, as those duties are usually and ordinarily performed. And the object in limiting this compensation to each day's attendance, was, to secure on the part of the member, who was not within the exemptions provided for by section 44, the performance of legislative duty during those days which the house to which he belonged deemed necessary to devote to the business of legislation. It was never intended that the members of the Legislature should not receive pay for Sundays, or pending temporary adjournments

upon holidays, or on occasions of the death of a member. The practical construction of the law, from the organization of the government to the present time, has been otherwise, and we have no disposition to depart from it. These are not regarded as permanent cessations in the business of legislation, but in the nature of adjournments from day to day, when, in legal contemplation, the business is progressing. Indeed, it may often happen, that a temporary adjournment for a few days may tend to facilitate the business, since the committees may thus be afforded time to consider of and mature the matter of bills and resolutions referred to them. But when, as in the case before us, there is an adjournment for near three weeks--for such a period of time, as to afford a reasonable inference that it was designed, not to facilitate the business of the session, but to operate a cessation of it for the given period, that the members may return to their respective homes--it would appear absurd to say that a member was in attendance upon the General Assembly, when it was not convened, and could not be, until the period which it had fixed for re-assembling had arrived.

The Supreme Court of Wisconsin quoted and adopted the above language in The State ex rel. Boyd v. Hastings, 16 Wis. 337 (1863).

In State ex rel. Van Horn v. Briggs, 5 N.D. 69, 63 N.W. 206 (1895), the North Dakota court held that the plaintiff, a member of the board of trustees of the penitentiary of North Dakota, was entitled to a per diem compensation for each day's time spent by him in and about his attendance at a board meeting, including the necessary time in travelling to and from the meeting, as well as for the day upon which the board was actually meeting. The governing statute provided:

The said trustees shall be entitled to receive the sum of three (\$3.00) dollars per day for each day employed in attendance upon said sessions, and all traveling expenses necessarily incurred therein.

The court said:

The meaning of the statute is not entirely clear, but we are inclined to interpret it liberally, and in such a way as will avoid unjust result. If a narrow and literal meaning is given to the word "attendance," it will follow that no member can receive anything at all for his traveling expenses, because there can be none while a member is in attendance at a session. During a session the member who is present cannot be traveling nor incurring expense in travel. But if the term "attendance" receives a more liberal construction when used in connection with traveling expenses, and is construed to mean the whole period during which the member is traveling to and from his place of residence to the place of the session, as well as while at the place of session, we can see no reason why the same word should not have the same significance when used in connection with the per diem allowed for compensation. The phrase "necessarily incurred therein" refers back to the word "attendance," and throws light upon the sense in which that word is used. A local member of the board who resides at Bismarck receives a per diem for all the time in which he is engaged in the service of the state as a member of the board; and we cannot, in the absence of an express provision requiring it, impute to the legislature a purpose to unjustly discriminate between a local member and one residing at a distance, who is, in equal justice, entitled also to pay for all the time which he devotes to the service of the state as a member of such board. The member residing at a distance from the place of meeting is not engaged in his own private business while traveling to and from the place of meeting, but is then employed in and about the matter of his "attendance" upon a session. The legislative purpose is clearly manifested that the office of a trustee shall not be a purely honorary office. The intention to compensate for their services by a per diem

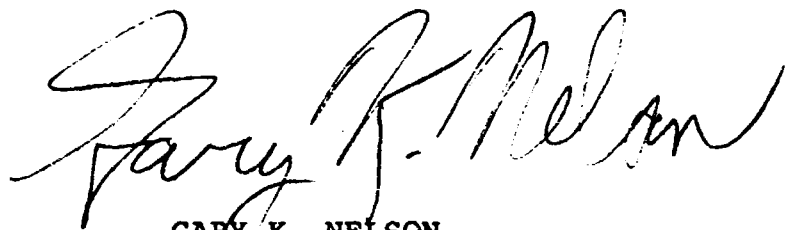
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is clearly expressed in the statute; and we are unable to see, either in the language employed by the legislature or in reason, why members should not be compensated for all the time necessarily and actually employed in the service of the state as members of such board. 63 N.W. at 207.

It appears to us that the intention of the Legislature in providing payments for subsistence expenses incurred in attendance upon the session was to secure the performance of legislative duties at any time during the session deemed necessary by the house of which the legislator is a member, including Sundays, holidays and temporary adjournments.

From the foregoing, it is our opinion that legislators would be entitled to be paid for subsistence during the December 21, 1973, to January 6, 1974, recess of the First Special Session of the 31st Legislature for expenses incurred each day resulting from attendance upon the session. Each legislator and the presiding officer of the house of which he is a member must determine whether, during the recess, the legislator incurred subsistence expenses for which A.R.S. § 41-1104 authorizes him to be paid.

Respectfully submitted,



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The Attorney General

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